# RECENT DECISIONS.

CONSTITUTIONAL LAW—CLASSIFICATION—RAILROAD EMPLOYEES. A statute of Ohio provided that railroad companies should be liable when employees exercising no authority were injured through the negligence of other employees exercising authority. In an action by a fireman injured through the negligence of an engineer on another locomotive, it was *held* that there was reasonable ground for the classification and the statute was constitutional. *Kane* v. *Erie R. Co.* (1904) 133 Fed. 681. See NOTES, p. 393.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—ORIGINAL PACKAGE. By the Iowa Code a tax was imposed upon the person of any one disposing by sale of cigarettes, and also upon the property whereon they were sold. The plaintiff contended that the act was unconstitutional as interfering with the power of Congress to regulate interstate commerce. The immunity from the tax was sought on the ground that the cigarettes shipped were original packages. *Held*, the packages were not original, and the act is constitutional. *Cook.* v. *County of Marshall* (1905) 25 Sup. Ct. 233.

The only distinction between the principal case and the case of *Austin* v. *Tennessee* (1900) 179 U. S. 343, seems to be one of fact. In the latter case the packages of cigarettes were shipped in baskets, while here they were apparently shoveled into and out of the car in pasteboard boxes containing ten cigarettes each, but these boxes bound together in no way whatever. Evidently this was an attempt to have the *Austin* case reconsidered. For a discussion of that case, see 1 COLUMBIA LAW REVIEW 192.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—SHERMAN ACT. The defendants combined to control a large portion of the trade in cattle and meats, and as incidents to this plan they not only maintained uniform cartage rates on interstate sales, but fixed uniform prices for meats after they had come to rest within the state and were sold in other than the original package. *Held*, the whole plan was in restraint of interstate commerce, and each part of the plan might be restrained. *Swift & Co.* v. *United States* (1905) 196 U. S. 375. See NOTES, p. 388.

CONSTITUTIONAL LAW—REMOVAL OF CAUSES—EMINENT DOMAIN. The plaintiff, a Kentucky corporation, sought to condemn the land of the defendant, a Delaware corporation, in accordance with the authority granted by the Kentucky statutes. The defendant moved to have the case removed to the federal circuit court on the ground that there was a controversy between citizens of different states. *Held* (the Chief Justice and Justices HOLMES, BREWER and PECKHAM dissenting) that the proceeding for the taking of land by eminent domain was a suit involving a controversy between citizens of different states of which the federal circuit court had original jurisdiction and was therefore removable to that court when commenced in the state court. *Madisonville Traction Co.* v. *St. Bernard Mining Co.* (1905) 25 Sup. Ct. 251. See NOTES, p. 389.

CONTRACTS—BENEFICIARIES UNDER CITY'S CONTRACT WITH WATER COMPANY. The appellant, a water company, contracted with the city to furnish a supply of water at a certain pressure for fire purposes. A householder brought an action for the breach of this contract. *Held*, he could recover damages for loss of his house for failure of the water com-

pany to furnish pressure according to their contract with the city. *Lexington Hydraulic, etc. Co.* v. *Oots* (Ky. 1905) 84 S. W. 774.

The decision in the principal case is contrary to the great weight of authority, it being almost universally held that a property holder cannot sue on such a contract. *Wainwright* v. *Queens Co. Water Co.* (1894) 78 Hun 146; *Howsman* v. *Trenton Water Co.* (1893) 119 Mo. 304; *Britton* v. *Waterworks Co.* (1892) 81 Wis. 48. Nor does the assumption by the company of functions properly appurtenant to the municipal corporation put the former under a duty to the plaintiff, since the municipality itself would not be liable under the circumstances. *Eaton* v. *Fairbury Waterworks Co.* (1893) 37 Neb. 546; see *Van Horne* v. *Des Moines* (1884) 63 Ia. 447; *Mendel* v. *Wheeling* (1886) 28 W. Va. 233; Dillon's Municipal Corporations, 4th ed., § 976. The court follows *Paducah Lumber Co.* v. *Water Supply Co.* (1889) 89 Ky. 340, saying that a principle "when settled right ought to be adhered to without reference to the number of contrary adjudications in other jurisdictions." Though incidentally the contract benefits the individual the central object of such contract on the part of the city is to secure the discharge of its functions as agent of the state, a fact overlooked by the court in the principal case.

CONTRACTS—LIQUIDATED DAMAGES—USE OF WORD "PENALTY." A contract for the delivery of torpedo boat destroyers to the Spanish government provided a "penalty" of £500 per week for each vessel not delivered on time. *Held*, where the damages are speculative, the use of the word "penalty" will not preclude the court from enforcing the provision. *Clydebank Co.* v. *Yzquierdo y Castaneda* [1905] A. C. 6.

While at common law a contract was enforceable in its strict terms, 1 Wms. Saunders 58 n. (1), the statute of 8 and 9 Wm. III c. 11, § 8, 7 Sts. of Realm 202, following equity, provided for the assessment by the jury of actual damages, and penalties became generally unenforceable, *Betts* v. *Burch* (1859) 4 H. & N. 506, though there are exceptions. 1 Wms. Saunders 58 n. (1), (a.). In determining what is a penalty, some courts hold the language of the parties is not decisive, *Bonsall* v. *Byrne* (1867) Ir. R. 1 C. L. 573; *Chatterton* v. *Crothers* (1885) 9 Ont. 683; contra *Smith* v. *Dickenson* (1804) 3 Bos. & P. 630, and treat a sum called a penalty as liquidated damages where the damages are speculative and conjectural, *Pastor* v. *Solomon* (1899) 26 Misc. 125, or the sum is payable on one event and not as to one of several. *Sparrow* v. *Paris* (1862) 7 H. & N. 594. Other courts, considering the word penalty much stronger than the phrase liquidated damages, and all but conclusive, refuse, except on very strong evidence, to consider as damages a sum denominated a penalty. *Taylor* v. *Sandiford* (1822) 7 Wheat. 13; *Smith's Adm.'s* v. *Wainwright's Adm.'s* (1852) 24 Vt. 197; *Davis* v. *Gillett* (1872) 52 N. H. 126; *Kelley* v. *Fejervary* (1900) 111 Iowa 693, 699. The principal case is in accord with the English doctrine.

CORPORATIONS—ACTION BY STOCKHOLDER—CONDITIONS TO ACTION. A complaint alleged that two defendants by acting in collusion with the directors of the defendant corporation, had obtained possession of certain stocks. The complainant petitioned for a cancellation of the contracts by which the securities were obtained. *Held*, the complaint was demurrable because it failed to allege that the corporation had been requested to sue and that it had refused to do so. *O'Connor* v. *Virginia Passenger and Power Co.* (1904) 92 N. Y. Supp. 161.

A corporation being regarded both at law and equity as separate and distinct from its stockholders, in order that the latter may bring a suit which concerns directly the corporate entity they must allege and prove that the corporation was unwilling to sue in its own behalf. *Ware* v. *Bazemore* (1877) 58 Ga. 316; Morawetz on Corps. § 242. There are

exceptions, however, to this well recognized rule. Where an appeal to the directors to bring suit would apparently be unavailing, refusal to sue is implied, as where only a brief period for bringing suit remains, *Young* v. *Alhambra Min. Co.* (1895) 71 Fed. 810, or where the directors themselves are guilty of a wrong against the corporation, *Brewer* v. *Boston Theatre* (1870) 104 Mass. 378, or where they cannot be found. *Wilcox* v. *Bickel* (1881) 11 Neb. 154. Since in the principal case the complaint on its face showed that the directors had colluded with the vendees of the stock, the result reached appears to be questionable.

CORPORATIONS—SCRIP DIVIDENDS—WHEN PAYABLE. Scrip dividends representing undivided earnings of the defendant company were issued to the stockholders in proportion to the shares which they held and subject to the same conditions. The certificates, one of which was in the hands of the plaintiff, recited that they were "payable at the pleasure of the company." *Held*, they were payable within a reasonable time, being evidences of debts. *Billingham* v. *Gleason Mfg. Co.* (1905) 91 N. Y. Supp. 1846.

The court, in treating the certificate as an evidence of indebtedness, seems to have disregarded the fact that the earnings represented had never been divided nor payment directed to the stockholders. A cash dividend from the time it is declared becomes a debt, *King* v. *Paterson* (1860) 29 N. J. 82; Morawetz on Corps. § 450, and after a demand is made a stockholder may sue in assumpsit. *Brown* v. *Lehigh Coal & Nav. Co.* (1865) 49 Pa. 270. But scrip dividends, which are not in a strict sense dividends at all (see Taylor on Pri. Corps. 4th ed. § 801, and *Terry* v. *Eagle Lock Co.* (1879) 47 Conn. 164), but accumulations of profits for which certificates are issued ratably among the shareholders, should be subject to the same conditions as shares of stock. And in the principal case they were expressly made so. The decision, on the facts, seems at least questionable.

CORPORATIONS—ULTRA VIRES CONTRACTS—ESTOPPEL. The defendant, a religious corporation, in order to borrow money subscribed to stock in the plaintiff building and loan association. The act was ultra vires, but the defendant had received and used the money. *Held*, the defendant is estopped from setting up the defense of ultra vires to an action on the contract, for the contract had been fully executed by the plaintiff. *U. S. Savings & Loan Co.* v. *Convent of St. Rose* (1904) 133 Fed. 354.

Some courts hold that when the contract has been performed on one side it may be enforced, although it be ultra vires. *Bath Gas Light Co.* v. *Claffy* (1896) 151 N.Y. 24; *Boyd* v. *Am. Carbon Block Co.* (1897) 182 Pa. St. 206. But the rule prevailing in England, the Supreme Court of the United States and several of the State courts is that an ultra vires contract is absolutely void, and that part performance cannot make it enforcible, though there may be a recovery in quasi contract. *Balfour* v. *Ernest* (1858) 5 C. B. N. S. 601; *Pearce* v. *M. & I. R. Co.* (1858) 21 How. 441; *Marble Co.* v. *Harvey* (1892) 92 Tenn. 115; Brice, Ultra Vires, 3rd ed., 693, 694. It would seem that the court in the principal case overlooked the rule applied by the federal courts to this class of cases. *Pearce* v. *M. & I. R. Co.*, supra. For a general discussion of ultra vires contracts, see 5 COLUMBIA LAW REVIEW, 235.

CRIMINAL LAW—LOTTERY—WHAT CONSTITUTES. A tailor organized a "suit club" of thirty members, each one agreeing with the tailor to pay him one dollar a week for thirty weeks, unless the number given the member should be earlier drawn at one of the weekly drawings to be held, in which case such member would receive a suit of clothes worth thirty dollars and drop out, the last one at the end of the thirtieth week to receive

a similar suit. *Held*, on trial of the tailor upon an indictment, that the scheme was a lottery. *De Florin* v. *State* (Ga. 1905) 49 S. E. 699.

To constitute a lottery, all that is required is that the subscriber to the scheme should give up something of value, *Cross* v. *People* (1893) 18 Colo. 321, and that he should have a chance of gain. *State* v. *Maren* (1892), 48 Minn. 555. There need be no chance of his loss. *U. S.* v. *Olney* (1868) 1 Abb. 275; *Lang* v. *Merwin* (1905) 50 Atl. 1021. As the term "lottery" has no definite legal signification, the court is logical in bringing within the prohibitory statutes all schemes that involve thriftlessness or other evils aimed at. Bishop, Stat. Crimes, §§ 951, 952.

DOMESTIC RELATIONS—ANNULMENT OF MARRIAGE—RIGHT TO DOWER. The plaintiff, who had separated from her husband, obtained an annulment of the marriage. She now seeks to have this decree vacated to get dower. It was *held* that as there had been a division of the property at the separation, the vacation should be denied. *Golden* v. *Whiteside* (Mo. 1905) 84 S. W. 1125.

At common law a decree of divorce which annulled a marriage barred the wife's right to dower. Y. B. (1496) 11 Henry VII. 27; 2 Bl. Comm. 130. At the present time, in the absence of a statute, divorce cuts off this right. *Barrett* v. *Failing* (1884) 111 U. S. 523; *Manin* v. *Manin* (1882), 59 Ia. 699. Most of the states, however, have allowed the wife dower by statute, when she is the innocent party. But it is not such a right that a divorce will be vacated to effectuate it, when a former settlement has been made. *Cabell* v. *Cabell's Administrators* (Ky. 1858) 1 Metc. 319. As a decree of annulment makes the marriage void ab initio, *Powell* v. *Powell* (1877) 18 Kan. 371, there would seem to be even less reason for granting such decree for the sole purpose of getting dower.

DOMESTIC RELATIONS—SECOND MARRIAGE AFTER INTERLOCUTORY BUT BEFORE FINAL DECREE OF DIVORCE. In an action to annul a marriage, it appeared that the defendant's wife had obtained an interlocutory judgment for divorce against him on the ground of adultery. Before the final decree for divorce, the plaintiff and the defendant went to a neighboring state, there married, and immediately returned to New York. *Held* that the original marriage continued unimpaired until the final decree was entered, but that a decree of annulment should be denied on the ground that she had confirmed the contract by cohabitation with the defendant for nearly two years after the entry of the final decree for divorce, and that there was a valid and existing marriage between the parties to the action. *Petit* v. *Petit* (1904) 91 N. Y. Supp. 979.

A decree for absolute divorce takes effect at the time it is rendered, and does not relate back to the date of the interlocutory decree. *Norman* v. *Villars* (1877) L. R. 2 Exch. Div. 359; *Cook* v. *Cook* (1887) 144 Mass. 163. A second marriage contracted before the entry of such absolute decree is therefore void. *Noble* v. *Noble* (1869) L. R. 1 P. & D. 691; *Moors* v. *Moors* (1876) 121 Mass. 232. If the final decree for divorce had been entered, the second marriage would be void. N. Y. Gen. Laws, ch. 48 §3. As the marriage was absolutely void, it could not be confirmed. See *Crump* v. *Morgan* (N.C. 1843) 3 Ire. Eq. 91, 99; *Ward* v. *Dulaney* (1852) 23 Miss. 410, 432, 433; *Koonce* v. *Wallace* (N. C. 1859) 7 Jones's L. 194, 198. The parties having resided in New York continuously from the date of entry of the final decree for divorce, a common law marriage was also impossible. N. Y. Gen. Law, ch. 48 § 11. Ordinarily if a marriage is a nullity, and suit is brought, a court of equity must proceed to a decree. *Crump* v. *Morgan*, supra, 100, 101. However a decree of nullity will be denied to one who knew of the existing prior marriage, as did the plaintiff in the principa case, and upon this ground the case is supportable. *Kerrison* v. *Kerrison* (N. Y. 1880) 60 How. Prac. 51; *Rooney* v. *Rooney* (1896) 54 N. J. Eq. 231

contra, *Andrews* v. *Ross* (1888) 14 Pro. Div. 15; *Anonymous* (N. Y. 1874) 2 Thomp. & C. 558.

EQUITY—CONTINUING TRESPASS UNDER COLOR OF POLICE DUTY —INJUNCTION. The defendant, a police captain, suspecting that gambling was going on in the plaintiff's saloon, stationed policemen there continuously day and night to the great injury of the plaintiff's business. *Held* that the defendant's acts amounted to a continuing trespass and that an injunction would lie to restrain further trespassing. *Hale* v. *Burns* (1905) 91 N. Y. Supp. 929.

The acts of the defendant in the principal case amounted to an oppression, *People* v. *Summers* (1903) 82 N. Y. Supp. 297, as defined by the Penal Code § 556. The imposition of the criminal liability was held to have given the plaintiff an adequate remedy at law in *Storman* v. *Kennedy*, (1862) 15 Abb. Pr. 201, a questionable view overruled by *Hertz* v. *McDermott* (1904) 90 N. Y. Supp. 803, where a preliminary injunction was granted in order to prevent irreparable injury. Where it appears that the plaintiff maintains a common gambling establishment, and constant surveillance is the only way to prevent continuance of crime, a temporary injunction will be denied. *Weiss* v. *Herlihy* (1897) 23 App. Div. 608. Even then it would seem that no right of occupation was conferred on the police by § 37 of the Liquor Tax Law, Gen. Laws New York, c. 29 or by § 315 of the Charter of New York City.

EQUITY—INJUNCTION—BREACH OF CONTRACT—UNFAIR TRADE. The plaintiff, a manufacturer of proprietary medicines, in selling to middlemen, designated certain retailers whom they might supply. With these retailers he had contracts, stipulating the retail selling price. The defendant, an outsider, had purchased surreptitiously from a middleman, and was selling the medicines in mutilated packages at reduced rates. *Held*, the defendants would be enjoined, first, from inducing dealers to break their contracts with the plaintiff, and second, from selling the plaintiff's preparations in anything but original, unaltered packages. *Dr. Miles Medical Co.* v. *Goldthwaite* (1904) 133 Fed. 794.

As inducing one to break his contract with another is a tort, *Lumley* v. *Gye* (1853) 2 E. & B. 216; Pollock, Torts *45 et seq.; *Walker* v. *Cronin* (1871) 107 Mass. 555, a proper case having been made out, an injunction should be granted to prevent it. *Sperry & Hutchinson Co.* v. *Mechanics Clothiers Co.* (1904) 128 Fed. 800. However, covenants generally will not run with personal property, 5 COLUMBIA LAW REVIEW 62, and equitable relief to restrain unfair trade is given only where deceitful representation or perfidious dealing is made out or clearly inferable from the circumstances. *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.* (1890) 138 U. S. 537. The last element is wanting in the principal case. While sound in granting the relief first prayed, the court seems to have gone far in granting the second prayer.

EQUITY—INJUNCTION FOR INFRINGEMENT OF TRADE MARK—ASSIGNMENT IN GROSS. The plaintiff as assignee of the trade mark of a defunct corporation sued the defendants for an infringement thereof. The plaintiff had acquired no interest in the business or good will of the said corporation, *Held*, the plaintiff has no title to the trade mark, it not being assignable apart from the business. *Falk* v. *The Am. West Indies Trade Co.* (1905) 180 N. Y. 445.

A trade mark is a recognized form of property, 2 COLUMBIA LAW REVIEW 245, 406; 3 id. 494; *La Croix* v. *May* (1883) 15 Fed. 236; *Bradley* v. *Norton* (1865) 33 Conn. 157, but only in connection with the business to which it is attached, *Prince Manuf'g Co.* v. *Paint Co.* (1890) 20 N. Y. Supp. 462. It may be assigned together with such business, *Atlantic Milling Co.* v. *Robinson* (1884) 20 Fed. 217; *Dixon Crucible Co.* v. *Guggenheim* (Pa.

1869) 2 Brewster 321, but not independently thereof. *Cotton* v. *Gillard* (1874) 44 L. J. Ch. 90; *Weston* v. *Ketcham* (N. Y. 1876) 51 How. Pr. 455. Such an assignment would be a fraud on the public since it would enable one man to sell his goods as those of another.

INSURANCE—WAIVER—RESTRICTION OF AUTHORITY OF AGENT. The plaintiff's intestate accepted a policy which provided that it should be void if the premium was not paid in cash, and that no agent had authority to waive this condition. *Held*, waiver by a subagent did not bind the company. *Pennsylvania Casualty Co.* v. *Bacon* (1904) 133 Fed. 907.

The general agent of an insurance company has the authority to waive conditions, but a subagent has not. *Continental Life Ins. Co.* v. *Willets* (1872) 24 Mich. 268. But in any event where the assured accepts a policy which expressly negatives this presumption, the company is not bound by the act of the agent. *McIntyr* v. *Mich. State Ins. Co.* (1883) 52 Mich. 188; *Assurance Co.* v. *Building Ass'n* (1902) 183 U. S. 308; *Enos* v. *Sun Ins. Co.* (1885) 67 Cal. 621. But an estoppel may nevertheless be created by the course of business of the company, relied on by the assured. *Kenyon* v. *K. T. and M. M. A. Ass'n* (1890) 122 N. Y. 247; May, Insurance § 137.

MASTER AND SERVANT—ASSUMPTION OF RISK BY A CONVICT. The plaintiff, a convict leased out by the state, was injured while in the course of the employer's business. *Held*, as he had not assumed the ordinary risks of the service, he could recover damages. *Simonds* v. *Georgia, S. & C. Co.* (1904) 133 Fed. 776.

A servant on entering service impliedly assumes the ordinary risks of the employment. *Tuttle* v. *Milwaukee R. Co.* (1887) 122 U. S. 189; 5 COLUMBIA LAW REVIEW 158. This doctrine is limited to cases where the servant's acts are not done under compulsion. Accordingly a seaman who obeys a command from fear of punishment is not subject to the rule but may recover for injuries. *Eldridge* v. *Atlas S. S. Co.* (1892) 134 N. Y. 187. A convict acting under orders does not assume the risks involved in the performance of a directed involuntary act. *Chattahoochee Brick Co.* v. *Braswell* (1893) 92 Ga. 631. So where the whole employment is entered upon involuntarily as in the principal case there would seem to be no assumption of risk, the question however being different from an immunity from contributory negligence. *Dalheim* v. *Lemon* (1891) 45 Fed. 225. In such case he is not a free agent and should be relieved from the burden of assuming risks in hazardous undertakings.

MASTER AND SERVANT—ASSUMPTION OF RISK—NON-COMPLIANCE WITH STATUTE. The defendant failed to guard a saw in the manner prescribed by statute. The plaintiff, his servant, aware of the nature and extent of the danger, was injured while operating the saw. *Held*, the plaintiff had assumed the risk and could not recover. *Nottage* v. *Sawmill Phœnix* (1904) 133 Fed. 979.

The assumption of risk by a servant in an employment is a waiver of the master's duty to protect him from obvious dangers. 5 COLUMBIA LAW REVIEW 158. A statute like that in the principal case is held by some courts to define the duty of a master under certain circumstances, but not to affect the freedom of the servant to waive the performance of this duty. *Spiva* v. *Osage Coal, etc., Co.* (1885) 88 Mo. 68; *Keenan* v. *Edison Co.* (1893) 159 Mass. 379; *Knisley* v. *Pratt* (1896) 148 N. Y. 372; *Higgins Carpet Co.* v. *O'Keefe* (1897) 79 Fed. 900. But other courts hold that such statutes are designed to protect the laborer, and that it is against public policy to allow him to waive such protection. *Davis Coal Co.* v. *Polland* (1902) 158 Ind. 607; *Narramore* v. *Cleveland etc., R. Co.* (1899) 96 Fed. 298. The latter view effectuates the purpose of such statutes more completely than the construction adopted in the principal case which renders the enforcement of the statutory penalty the exclusive remedy.

MASTER AND SERVANT—INJURY TO SERVANT WHILE OFF DUTY—FELLOW SERVANTS. The plaintiff, a street car conductor in the employ of the defendant, but absent from duty on sick leave, boarded a horse car, and at the conductor's direction, rode on the front platform. While riding there he was injured by the negligence of the driver. *Held*, the plaintiff was a fellow servant of the driver, and could not recover. *McLaughlin* v. *Interurban St. Ry. Co.* (1905) 101 App. Div. 134.

The relation of master and servant depends upon the right of one to direct the other at the particular time, place, and business. *Corbin* v. *American Mills* (1858) 27 Conn. 274; Thompson, Negligence 1046. It has been held that a railroad engineer off duty without leave was not the fellow servant of a negligent employee on another of the defendant's trains. *Washburn* v. *Railroad Co.* (Tenn. 1859) 3 Head 638. The court in the principal case seems to be misled, by a seeming analogy of facts, to extend the former New York doctrine, *Ross* v. *Railroad Co.* (1875) 5 Hun 488; *Vick* v. *Railroad Co.* (1884) 95 N. Y. 267, to a case where the relation of master and servant does not exist and the fellow servant rule should not apply. 3 COLUMBIA LAW REVIEW 49.

PLEADING AND PRACTICE—NEW YORK CODE—EXECUTION AGAINST THE PERSON. In an action to recover for injuries caused by the negligence of the defendant's servant, a judgment was given for the plaintiff. An execution against the property of the defendant having been returned unsatisfied, an execution against the person was issued. *Held*, the execution was proper process. *Ossman* v. *Crowley* (1905) 92 N. Y. Supp. 29.

In section 1487, sub. 1, of the Code of Civil Procedure provision is made for execution against the person of the judgment debtor where the right to arrest depends upon the nature of the action. Section 549 provides that the defendant may be arrested in an action brought to recover damages for a personal injury. Section 3343, sub. 9, provides that "a personal injury includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment and other actionable injury to the person either of the plaintiff or of another." Except under a very strict construction, this would include an injury by the defendant's servant. The decision in the principal case is contrary to *Lasche* v. *Dearing* (1898) 23 Misc. 722, and *Davids* v. *Brooklyn Heights R. Co.* (1904) 92 N. Y. Supp. 220. Chap. xxii, Code of Civ. Proc., deals solely with definitions and is so entitled. The court in the principal case seems correct in not considering Section 3343 as of a penal nature, according to the forced interpretation that was given it in the earlier cases.

PLEADING AND PRACTICE—STATUTE OF FRAUDS—MANNER OF PLEADING. The complaint showed on its face that the contract sued on was oral and not to be performed within a year. The defendant put in a general denial, and specially pleaded the statute of frauds. On trial, he moved for judgment on the pleadings. *Held*, the objection may be taken either by demurrer, under Sec. 488 of the Code, allowing a demurrer when "the complaint does not state facts sufficient to constitute a cause of action"; or by answer, as here, under Sec. 499 of the Code, providing that the objection that the facts do not constitute a cause of action is not waived by failure to demur. *Seamans* v. *Barentsen* (1905) 180 N. Y. 333.

Even under the assumption that the statute of frauds cannot be taken advantage of by a demurrer, the same result should have been reached, since it was specially pleaded. But the decision is expressly based on the doctrine that the statute of frauds prevents the existence of a cause of action. See 3 COLUMBIA LAW REVIEW 576.

PLEADING AND PRACTICE.—STATUTE OF LIMITATIONS—CONCEALED FRAUD. The stockholders of a corporation brought suit against its pro-

moters and trustees to recover unlawful profits made by them through a sale to the corporation of real estate purchased by them. Defense, the statute of limitations. *Held*, the concealment of fraud does not suspend the running of the statute under Sec. 4222, Rev. St. 1898, providing for such a pleading in equitable actions. *Pietsch* v. *Milbrath* (Wis. 1905) 102 N. W. 342.

The revising statutes of 3 and 4 Wm. IV. c. 27, Statutes at Large, which expressly included equitable actions and suspended the statute during concealment of fraud, has been generally followed in American statutes, either as to all actions, legal and equitable, *Pilcher* v. *Flinn* (1868) 30 Ind. 202; purely equitable or concurrently legal and equitable, *Bosley* v. *N. M. Co.* (1890) 123 N. Y. 550; or equitable only, *Carrier* v. *Railroad Co.* (1890) 79 Iowa 80. In equitable actions, similar rules are applied by the courts in the absence of statutes. *Peck* v. *Bank of America* (1890) 16 R. I. 710; *Meader* v. *Norton* (1870) 11 Wall. 442. Without express provision as to fraud, law courts are often less liberal. *Troup* v. *Smith* (1822) 20 Johns 33: but see *Sherwood* v. *Sutton* (1828) 5 Mason 143, 151. As usually, without the authority of a statute, only equity permits suspension for fraud, where equity alone is mentioned in the statute, the suspension should not be applied to legal actions.

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND. The plaintiff covenanted to permit one Gump to build against the plaintiff's wall, but later learned that the consideration moving from Gump had failed. However he gave no notice thereof to the defendant who subsequently acquired Gump's land. It does not appear that the defendant had notice of the covenant or that any use had ever been made of the plaintiff's wall. *Held*, the plaintiff is estopped from setting up against the defendant the invalidity of the covenant. *Knappenberger* v. *Fairchild* (Pa. 1904) 59 Atl. 986.

The benefit of a covenant touching and concerning the estate of the covenantee will run with that estate, *Pakenham's Case* (1368) Y. B. 42, Ed. III. 3, pl. 14; *Allen* v. *Culver* (N. Y. 1846) 3 Dunio 284, even though the assignee takes without notice. *Horn* v. *Miller* (1890) 136 Pa. St. 640. If he takes with notice it will be presumed that the covenant formed part of the consideration for his purchase, *Hill* v. *Miller* (N. Y. 1832) 3 Paige Ch. 254, but no such presumption can arise if he takes without notice. Without such notice it is difficult to find an estoppel which should deprive the covenantor in the principal case of the privilege of raising against the assignee any defense which he might have used against the covenantee himself.

REAL PROPERTY—EASEMENT NOT FORFEITED BY EXCESSIVE USER. The owners of a lot with an easement of way erected an office building on it and on adjoining lots, which largely increased the user. *Held*, all user would be restrained until a restriction of the use for the benefit of the dominant tenement only was accomplished. *McCullough* v. *Broad Exchange Co.* (1905) 32 N. Y. L. J. 2013.

An easement is not forfeited by excessive user, *Proprietors* v. *N. & L. R. R.* (1870) 104 Mass. 1; *Roby* v. *N. Y. C. & H. R. R.* (1894) 142 N. Y. 176, nor by assertion of ownership of the servient tenement. *White's Bank* v. *Nichols* (1876) 64 N. Y. 65. In the principal case the referee found that the rightful and the excessive user could not be separated. While no adjudications on this precise point can be found, there are numerous dicta to the effect that acts which make this separation impossible, forfeit the easement. SHAW, C. J. in *Dyer* v. *Sanford* (1845) 9 Met. 402; *Taylor* v. *Hampton* (S. C. 1827) 4 McCord 106; Gale on Easements 507. Such acts might be sufficient evidence of intention to abandon, a question depending upon the facts of each case. *Welsh* v. *Taylor* (1892) 134 N.

Y. 450. A failure to comply with the injunction limiting the use to the extent of the easement would establish such intention in the principal case.

REAL PROPERTY—EMINENT DOMAIN—CONFLICTING RIGHTS OF RAILWAY AND TELEGRAPH COS. By separate acts Congress has declared all railroads to be postroads, U. S. Rev. Sts. § 3964, and has given telegraph companies the right to construct, maintain and operate their lines along and over all postroads in the United States. Act July 24, 1866. Rev. Sts. §§ 5263 et seq. The petitioner, a telegraph company, filed a bill to restrain the defendant railway company from removing its telegraph lines, pending condemnation proceedings by the petitioner. The lines had been placed upon the defendant's right of way under a contract which had expired. *Held*, these acts did not give telegraph companies the right of eminent domain, but withdrew from state interference interstate commerce by telegraph. *Western Union Tel. Co.* v. *Penn. Ry. Co.* (1904) 25 Sup. Ct. 133.

This decision extends somewhat the case of *Pensacola Tel. Co.* v. *Western Union Tel. Co.* (1877) 96 U. S. 1, which decided that a state is powerless to grant a telegraph company a monopoly, such an act being an interference with interstate commerce. See *Western Union Tel. Co.* v. *Ann Arbor Ry. Co.* (1900) 178 U. S. 239. In deciding that the right of eminent domain was not conferred, the case settles a question which has been productive of much litigation. *Postal Tel. Co.* v. *Oregon, etc., Ry.* (1902) 114 Fed. 787; *St. Paul M. & M. Ry. Co.* v. *Union Tel. Co.* (1902) 118 Fed. 497. Mr. Justice HARLAN, in dissenting, said that the rights expressly conferred by the statute carried with them, by necessary implication, the right to condemn. While it is true that the right to condemn may be given by implication, still omission from the statute of any provision for compensation is fatal to a claim of eminent domain. 1 Lewis Em. Dom. § 240; Mills Em. Dom. § 128; *Sweet* v. *Rechel* (1895) 159 U. S. 380, 387; *Chamberlain* v. *Eliz. Steam Cord. Co.* (1886) 41 N. J. Eq. 43. The decision in the principal case, therefore, seems to interpret the statute correctly.

REAL PROPERTY—FIXTURES—CHANGE IN CHARACTER OF PROPERTY SUBJECT TO MORTGAGE. A sugar house with machinery, mortgaged to the plaintiff, was destroyed by fire, and the machinery left in a demolished and ruined condition, valuable only as scrap metal. *Held*, the mortgage does not attach to the remains of such machinery. *Folse* v. *Triche* (La. 1904) 37 So. 875.

As in Louisiana only immovables are subject to mortgage, La. Civ. Code § 3289, it was assumed that if the articles had become movables they would be discharged from the mortgage lien. Their character as immovables by destination or fixtures is determined by the intention to use them in connection with the realty, La. Civ. Code § 468, in direct analogy to the common law test. 2 COLUMBIA LAW REVIEW 407. When by circumstances such use is impossible and the destination which made them immovables is at an end, they reassume the character of movables, as in the case of materials after the demolition of a building under La. Civ. Code, § 476. See also *Beard* v. *Durald* (1873) 23 La. Ann. 284; *Meyers* v. *Schemp* (1873) 67 Ill. 469; contra *Rogers* v. *Gilinger* (1858) 30 Pa. St. 185. They have lost their adaptability "for the service and improvement" of the land. *Succession of Allen* (1896) 48 La. Ann. 1036, 1047. This doctrine would apply to fixtures, under mortgages as in the principal case. They may become chattels by severance by the act of the mortgagor in good faith. *Bank* v. *Knapp* (1870) 22 La. Ann. 117; *Weil* v. *Lapeyre* (1886) 38 La. Ann. 303; by the act of God, *Buckout* v. *Swift* (1865) 27 Cal. 433; by fire, *State* v. *Goodnow* (1883) 80 Mo. 271.

REAL PROPERTY—RESTRICTIVE COVENANTS—INTERPRETATION. The plaintiff and defendant derived title to neighboring premises from the same grantor through conveyances made in 1873, which prohibited the erection of tenement houses upon the premises. The plaintiff sought to enjoin the defendant from erecting a modern apartment house. *Held*, the restrictive covenant did not apply to such a building. *Kitching* v. *Brown* (1905) 180 N. Y. 414.

The words of a covenant are to be construed with regard to the meaning the parties attached to them, *Greenwood* v. *Ligan* (Miss. 1848) 10 Sm. & M. 615, but there is a presumption that the ordinary signification is intended, *Davis* v. *Lyman* (1826) 6 Conn. 249, unless a contrary intention appears, *Gillis* v. *Bailey* (1850) 20 N. H. 149. In the principal case the presumption is strengthened by the fact that the modern apartment house was unknown in 1873, *Boyd* v. *Kerwin* (1891) 15 N. Y. Supp. 721, and that this structure has none of the objectionable features of the tenement house of that day. *White* v. *The Build. Co.* (1903) 82 App. Div. 1. The fact that no restriction upon the erection of a hotel was placed in the deed which would be a more objectionable neighbor than an apartment house would bear upon the question. At best the courts look with but little favor upon restrictions on the use of property. *Hutchinson* v. *Ulrich* (1893) 145 Ill. 336; *Sonn* v. *Heilberg* (1899) 38 App, Div. 515.

TORTS—CONTRIBUTION—JOINT TORT-FEASORS. The plaintiff, a terminal company, having answered in damages to an employee injured in operating a defective car, attempted to recover indemnity from the defendant who had delivered the car to them in bad condition. Both parties had failed properly to inspect the car. *Held*, that where the parties are guilty of like neglect, there can be neither indemnity nor contribution unless the defendant be primarily responsible. *Union Stock Yards Co.* v. *Railroad Co.* (1905) 25 Sup. Ct. 226.

Contribution among joint tort feasors was early denied; *Merryweather* v. *Nixon* (1799) 8 D. & E. 186; but this rule has been restricted to torts of conscious wrongdoing. *Adamson* v. *Jarvis* (1827) 4 Bing. 66; Story, Partnership § 220; *Armstrong Co.* v. *Clarion Co.* (1870) 66 Pa. St. 218. The holding of the court in the present case, refusing complete indemnity because the defendant's negligence was not shown to be the primary cause of the injury, seems sound, but it is unusual and beyond the rule of the decided cases to refuse contribution for that reason. *Jacobs* v. *Pollard* (1852) 10 Cushing 287; *Acheson* v. *Miller* (1854) 2 Ohio St. 203; *Farwell* v. *Becker* (1889) 129 Ill. 261.

TORTS—LIABILITY OF MILITARY GOVERNOR. The plaintiff was possessed of an hereditary and alienable office known as the Alguacil Mayor of Havana, carrying with it the exclusive franchise to slaughter cattle in that city. The defendant was military governor of Cuba, and subsequent to the President's proclamation and the Treaty of Paris, both of which pledged protection to private property, issued an order abolishing this office. In an action to hold him personally liable for damages suffered in consequence of the order, a demurrer to the complaint was overruled and it was *held* that the franchise was private property. *Countess of Buena Vista* v. *Maj. Gen. Brooke* (1905) 32 N. Y. Law J. 1903. See NOTES, p. 394.

TORTS—SURGEONS—UNAUTHORIZED OPERATION. The plaintiff consulted the defendant, a surgeon, and he found that a major and a minor operation were desirable. He informed the patient of the necessity for the minor operation only, having found her in such a highly nervous and irritable condition that he considered her judgment impaired. She consented to the minor operation, and while she was under the influence of the anæsthetic for this the defendant performed the major operation also.

He acted with proper skill and care and with perfect good faith, for the welfare of the patient, but the court found that she was sane enough to be capable of consenting. *Held*, the surgeon was liable in exemplary damages. *Pratt* v. *Davis* (Ill. 1905) 37 Chic. Legal News 213. See NOTES, p. 395.

TRUSTS—DESTRUCTIBILITY UNDER THE N. Y. REVISED STATUTES. The testator died in 1892 and left personalty to a trustee in trust to pay the income to his wife for life, or until she remarry, remainder to his children. In February, 1903, the children conveyed their remainders to their mother, who then released her life interest, to herself as remainderman, and thereupon demanded the corpus of the trust fund. The trustee refused to relinquish the fund. *Held*, Section 3 of the Personal Property Law, permitting destruction of trusts by merger, is not retroactive; hence it was not within the power of the beneficiary to alien and the trust was not terminated. *Metcalfe* v. *Union Trust Co.* (1905) 181 N. Y. 39. See NOTES, p. 391.

TRUSTS—ORAL PROMISE BY HEIR. The intestate on her death-bed was about to make a will providing for the complainant, but refrained from so doing on the oral promise of her husband, the sole heir at law, to dispose of the property according to her directions. *Held*, in the absence of actual fraud, the heir at law takes an absolute title divested of trusts. *Cassels* v. *Finn* (Ga. 1905) 49 S. E. 749.

A devise in reliance on the devisee's oral promise, *Hoge* v. *Hoge* (Pa. 1832) 1 Watts 163, 214, to hold the property in trust, imposes on the devisee a constructive trust in favor of the intended beneficiary even in the absence of actual fraud. *Reech* v. *Kennegal* (1748) 1 Ves. St. 122; *Dowd* v. *Tucker* (1874) 41 Conn. 197; *Amherst* v. *Ritch* (1897) 151 N. Y. 282. The cases which rely on fraud define it as the neglect or refusal to perform the promise by which the property was secured, *Glass* v. *Gilbert* (1869) 102 Mass. 24, 40; *Norris* v. *Frazer* (1873) 15 L. R. Eq. 318; *Matter of the Will of O'Hara* (1884) 95 N. Y. 403, so that the theory of the cases is not based upon fraud but upon a principle analogous to restitution. The same principles have been applied to cases where, as in the principal case, the heir procures property by a promise to hold it in trust; *Williams* v. *Fitch* (1859) 18 N. Y. 546; *Grant* v. *Bradstreet* (1895) 87 Me. 583; and it would seem that the distinction made between taking as heir and as devisee, *Bediliars* v. *Seaton* (1860) 3 Fed. Cas. 38, is unsound, the making or not making of the will being in either case the result of the promise, and that therefore the principal case is wrongly decided.